Chicago-Kent Law Review

Volume 52
Issue 2 *Seventh Circuit Review*

Article 13

October 1975

Reasonable Suspicion of Illegal Alienage as a Precondition to Stops of Suspected Aliens

Ronald A. Stevens

Ronald A. Stevens

REASONABLE SUSPICION OF ILLEGAL ALIENAGE AS A PRECONDITION TO "STOPS" OF SUSPECTED ALIENS

Illinois Migrant Council v. Pilliod, 398 F. Supp. 882 (N.D. Ill. 1975).

> A conservative estimate in 1972 produced a figure of about one million, but the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country. Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services.[1]

So concluded the Supreme Court in its recent evaluation of the seriousness of the illegal alien problem in the United States. The recent case of *Illinois Migrant Council v. Pilliod*[2] presented a confrontation between the strong governmental interest in regulating aliens, legal and illegal,[3] and the fourth amendment freedom against unreasonable searches and seizures, which has been described by the Supreme Court as "the very essence of constitutional liberty."[4] It is clearly established that aliens are covered by this fundamental right,[5] but the law is evolving as to the precise nature of the fourth amendment protection as applied to Immigration and Naturalization Service[6] enforcement of immigration law.

In setting a standard governing I.N.S. stops and brief interrogations of persons suspected to be aliens, *Illinois Migrant Council* contributed to the refining of this developing area of law, but in so doing, created a direct conflict with decisions in two other circuits.[7] Granting a preliminary

1. United States v. Brignoni-Ponce, 95 S. Ct. 2574, 2579 (1975).

2. 398 F. Supp. 882 (N.D. Ill. 1975), *appeal docketed*, No. 75-2019, 7th Cir., Nov. 5, 1975.

3. The thrust of this interest centers on the regulation of illegal aliens and the discussion herein will deal primarily with this area; however, since the government expressed concern over the effect of Illinois Migrant Council v. Pilliod on the monitoring of legal aliens, this issue will be discussed in note 21 *infra*.

4. Harris v. United States, 331 U.S. 145, 150 (1947).

5. Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

6. Hereinafter referred to as I.N.S.

7. The approach taken by a third circuit was implicitly repudiated by the United States v. Brignoni-Ponce holding. The Tenth Circuit had developed a line of cases which permitted vehicular stops even when virtually without reason. Stops had been upheld based upon an officer's statement that "all six [occupants of the car] looked to him like 'illegal Mexicans'" (United States v. Granado, 453 F.2d 769, 770 (10th Cir. 1972)), and the fact that the subjects were "persons of obviously [*sic*] Mexican descent" (United States v. Saldana, 453 F.2d 352, 354 (10th Cir. 1972)). And in the most recent case a person apparently not of Mexican descent was routinely stopped for questioning to determine citizenship and the Court upheld that stop without identifying

injunction restraining I.N.S. agents from detaining, stopping, interrogating or otherwise interfering with persons of Mexican ancestry or Spanish surnames who are lawfully in the country unless such stops are justified, the district court defined the standard for justification. Persons may not be stopped absent a "reasonable suspicion based on specific articulable facts that such person is an alien *unlawfully* in the United States."[8] While not inconsistent with the recent Supreme Court case of *United States v. Brignoni-Ponce*,[9] upon which it heavily relied, *Illinois Migrant Council* goes beyond *Brignoni-Ponce* in deciding the very issue reserved by the Supreme Court: whether a suspicion of *illegal* alienage, rather than one of mere alienage, is required in order for I.N.S. stops to be permitted under the fourth amendment.[10] By deciding this issue in the affirmative, and applying the standard to brief stops constituting minimal intrusions, the district court extended the coverage of the fourth amendment and presented a conflict which can be finally resolved only by the Supreme Court.

In evaluating whether the *Illinois Migrant Council* standard is a correct application of the fourth amendment to this area of governmental regulation, this paper will discuss the factual setting upon which the decision was based, and the few Supreme Court cases that have touched upon this area. The decisions of the circuits in conflict with *Illinois Migrant Council* will be examined and the standard therein will be compared to that of *Illinois Migrant Council* in light of the Supreme Court cases, legal reasoning, and practical application. It will be concluded that the *Illinois Migrant Council* standard provides a reasonable balance between the conflicting interests of effective governmental regulation and constitutional protection of individual freedoms.

Illinois Migrant Council v. Pilliod

In their efforts to detect aliens, the I.N.S. officers confronted and questioned several persons employed by the Illinois Migrant Council.[11] Each

any circumstances on which reasonable suspicion of alienage could be based. United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973). It appears that the Tenth Circuit would permit any and all stops so long as made in order to determine citizenship. This view is clearly unconstitutional under United States v. Brignoni-Ponce, as discussed *infra* in the section entitled "The Supreme Court Cases".

8. Preliminary Injunction Order, No. 74 C 3111 (N.D. Ill., issued July 29, 1975) (emphasis added).

9. 95 S. Ct. 2574 (1975).

10. *Id.* at 2582 n.9. It is this issue which the article will focus on. The other two issues raised by the government in *Illinois Migrant Council*—whether a three judge court should have been impanelled and whether the district court's standard would prohibit the I.N.S. from monitoring legal aliens—are discussed *infra* at notes 19 and 21 and accompanying text. *See also* note 3 *supra*.

11. The encounters complained of consisted of two types: street encounters and "area control operations." This paper will consider that portion of the opinion which appears to be the most seriously contested, namely the standard set for justifying street encounters. The "area control operations" consisted of warrantless entries and searches

of these persons was either a citizen of the United States or a legally resident alien, and each claimed to have had his fourth amendment rights violated by the I.N.S. officers. The suit growing out of these encounters sought to enjoin the I.N.S. from "conducting . . . forcible stops and detentions without probable cause or articulable facts showing that there is substantial reason to believe such persons have entered the United States illegally."[12] The injunction was sought on behalf of the plaintiffs and all other persons of Mexican ancestry and appearance.

The circumstances of the encounters were as follows.[13] I.N.S. agents spotted two of the plaintiffs, Elias Montanez and Larry Sandoval, in a car travelling in the opposite direction. They made a U-turn and pulled up alongside plaintiffs' car, which by then had parked at the Rochelle, Illinois, office of the Illinois Migrant Council. Three agents exited their car and one asked Montanez, a lawful resident alien, where he was born. After answering, "Mexico", Montanez was asked to produce identification, which he did only after the agent threatened to take Montanez to Chicago and put him in jail. Apparently satisfied with Montanez' identification, the agents then asked Sandoval, a citizen, and the Director of the Rochelle Illinois Migrant Council office, to produce identification. Sandoval refused to produce any identification, even after he was threatened with being taken to Chicago. An agent then grabbed Sandoval's arm and placed him in the I.N.S. car. When again asked for identification, Sandoval replied that he did not think it was right for the officers to interfere with a citizen's rights. Apparently this implied assertion of citizenship satisifed the officers, who then released Sandoval.

The second incident involved Arturo Lopez, Deputy Director of the Illinois Migrant Council, and occurred in downtown Chicago as Lopez was walking to his office. Failing to identify themselves, two men approached Lopez and asked if he lived "in the area". Believing the reference to be to the immediate area, Lopez answered, "No, but I work around here". Lopez was then asked where he was born; he replied by asking where the two men were born. At this time the agents identified themselves. When Lopez then told the agents he was born in New Mexico, the agents' interest apparently ended.

of homes, dormitories, cottages and plants by I.N.S. agents. Conceding that no probable cause existed, the Government relied on the claim that consent was given. After ruling that the persons subjected to the searches and interrogations had not given consent, the court further held that the standard governing stops and interrogations within a plant setting is the same as that covering street encounters: reasonable suspicion based upon specific articulable facts that the subject is an illegal alien. Presumably, such reasonable suspicion could be founded upon sufficiently reliable information that illegal aliens were employed in a specific plant.

12. Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 29.

13. 398 F. Supp. at 887-88.

It is principally these encounters which plaintiffs claimed constituted unconstitutional seizures.[14] The district court ruled that such stops were not permissible under the fourth amendment unless specific facts existed upon which a reasonable suspicion of illegal alienage could be founded and held that such facts were not present in these encounters.

The government asserted that the standard requiring a reasonable suspicion of the subject's illegal alienage was too high a standard of justification.[15] Instead, it was argued, the reasonable suspicion of alienage alone should be sufficient. The thrust of this argument rested on three propositions: (1) that I.N.S. stops have statutory authorization when meeting the lower standard, and since any higher standard would thereby void the statute, only a three judge court could require a higher standard; (2) that the *Illinois Migrant Council* standard would prohibit the I.N.S. from monitoring legal aliens even though such aliens have consented to such monitoring as a condition to being permitted entrance and residence in the United States; and (3) that the minimal intrusion involved in "mere questioning", when weighed against the strong governmental interest at stake, warranted only the lower standard.

The first proposition maintained that since the actions complained of in *Illinois Migrant Council* were pursuant to statute, an attack on their constitutionality constituted an attack on the constitutionality of the statute itself, thus requiring the impanelling of a three judge court.[16] The statute which the government believed plaintiffs to be challenging provides:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations described by the Attorney General shall have the power without warrant
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.[17]

The argument was that a standard requiring reasonable suspicion of illegal alienage, rather than mere alienage, would render this section void and unenforceable. The attack would be not merely upon administrative action, but upon the Act of Congress.

The plaintiffs insisted[18] that they were not challenging the statute, but rather the actions of the administrative agency which go beyond the require-

14. One other street encounter occurring during an "area control operation" was cited by plaintiffs, but the facts there were so similar it is unnecessary to recite them, especially since the court dealt principally with those street encounters described herein. The area control operations are briefly discussed in note 11 *supra*.

15. Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 6-9.

16. *Id.* at 12-14.

17. 8 U.S.C. § 1357(a)(1) (1970).

18. Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 25-28.

ments of the statute and thereby stand alone, subject to a determination of unconstitutionality by a single district court judge. Agreeing with the plaintiffs, the district court held that since the agents' actions were not *required* by the statute and were not the *mere perfunctory application* thereof, the constitutionality of the statute need not be in issue.[19]

The government's second proposition—the claim that the I.N.S.' ability to monitor legal aliens would be jeopardized by the standard—was expressly raised only after the preliminary injunction was issued. In its Motion for

19. 398 F. Supp. at 892. Under 28 U.S.C. § 2282 (1970),

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application thereof is heard and determined by a district court of three judges under section 2284 of this title.

It is clear that a three judge court is not necessary for the construction of a statute. Query v. United States, 316 U.S. 486 (1942); *Ex Parte* Buder, 271 U.S. 461, 466-67 (1926). It is equally clear that questions of the constitutionality of a statute are to be deferred, where possible, until all other issues in a case are resolved, in order to avoid both the convening of a three judge court unnecessarily and the consideration by such a court of issues which could have been decided by a single judge. Wyman v. Rothstein, 398 U.S. 275 (1970); Rosado v. Wyman, 397 U.S. 397 (1970); Kelly v. Illinois Bell Tel., 325 F.2d 148 (7th Cir. 1963).

Illinois Migrant Council, however, does not present the option of avoiding constitutional issues entirely. The constitutionality of administrative action, if not that of a statute, is at issue. If the administrative action can be severed from the statute, thus removing the constitutionality of the statute itself from issue, and with it any need for a three judge court, the single judge district court can then decide the constitutionality of the administrative action. The Second Circuit view is that the single judge district court *should*, where possible, construe statutes such that it is the constitutionality of administrative action, rather than that of the statute which is in issue. Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (2d Cir. 1966). This view was followed in Woodward v. Rogers, 344 F. Supp. 974, 978 (D.D.C. 1972), where the court held that a challenge to "administrative action which is permitted but not required by broad legislative policy and which resulted from the exercise of administrative judgment and initiative" does not constitute a challenge to the Act, and therefore, is within the jurisdiction of a single judge district court. This view is strongly reinforced by the general proposition that three judge court statutes, including section 2282, are to be narrowly construed and sparingly applied. Mitchell v. Donovan, 398 U.S. 427 (1970); Phillips v. United States, 312 U.S. 246 (1941).

There remains the question of whether the statute in question can be so construed in this case. In *Brignoni-Ponce*, the Supreme Court construed the statute to imply a reasonable suspicion of alienage requirement. 95 S. Ct. at 2582. The fact that the very purpose of the questioning under section 1357(a)(1) is limited to determining the lawfulness of the subject's presence in this country would seem to *permit* a further inference that the agent must have some suspicion that the subject is *not* lawfully in this country. *Cf.* United States v. Bell, 383 F. Supp. 1298 (D. Neb. 1974).

The statute certainly does not expressly exempt the I.N.S. agents from a requirement of reasonable suspicion of illegal alienage, and to read such a requirement into the statute would not violate the language of the statute or render the statute meaningless. Rather, it would merely clarify the standard required, short of a warrant, before such questioning could commence. Therefore, the construction given the statute by the court is one which leaves the statute in force, leaving only the constitutionality of the administrative action in issue. It is then the administrative action which was found to be unconstitutional, and such finding was within the jurisdiction of a single judge district court.

Clarification of Preliminary Injunction Order, the government argued that the decision not only unduly hinders the I.N.S. enforcement of statutes, but renders such statutes null and void.[20] The plaintiffs disputed the contention that the *Illinois Migrant Council* standard would prevent the monitoring of known aliens; they maintained that the standard neither unduly restricts the I.N.S. nor challenges any statute.[21]

20. For example, 8 U.S.C. § 1304(e) [1970], requires every alien (immigrant or non-immigrant) eighteen years of age and over to carry with him at all times a certificate of alien registration or alien receipt card. Failure to do so subjects him to a possible misdemeanor conviction netting a maximum of a $100 fine and a 30 day prison term. Furthermore, 8 U.S.C. § 1305 [1970] requires every alien (immigrant or non-immigrant) to register with the Attorney General annually, and failure to do so subjects him to a possible fine of $200 and 30 day prison term. See 8 U.S.C. § 1306(b) [1970]. Moreover, even an alien, legally in the country, who fails to apply for registration or to be fingerprinted is subject to criminal sanctions including a $1,000 fine and six months imprisonment. See 8 U.S.C. § 1306(a) [1970]. Thus, if an I.N.S. agent, under the terms of the Opinion, is precluded from stopping a legal alien to make a limited inquiry as to his right to be in the United States, or to request to see his certificate of alien registration—even though the agent reasonably suspects on the basis of specific articulable facts, and reasonable inferences drawn therefrom, that the person in question is an *alien*—then, realistic enforcement of §§ 1304, 1305 and 1306 becomes, at best, a mere illusion, and the statutes themselves become hollow representations of Congressional intent.
Motion for Clarification of Preliminary Injunction Order at 6-7. (emphasis in original).

21. At the time of this writing, the district court had not yet ruled on the government's motion, but the government view appears to have been rejected in a similar situation. An attempt was made in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), to justify the search of a legal alien on the basis that it was administrative in nature. The source for this contention consisted of a pair of Supreme Court cases which had permitted searches of closely regulated and licensed businesses without warrants or probable cause. (United States v. Biswell, 406 U.S. 311 (1972); Colonade Catering Corp. v. United States, 397 U.S. 79 (1970)). The argument that aliens conditionally permitted to enter the United States were akin to a regulated business, and thus subject to "administrative" searches absent probable cause, was denied. 413 U.S. at 271. The Supreme Court thus refused to consider the regulation that is involved in immigration as placing a person in the same category as a regulated business for the purposes of administrative searches.

The other basis on which the Supreme Court distinguished *Almeida-Sanchez* from *Biswell* and *Colonade* is equally relevant here. The businesses searched were *known* to be within the scope of the regulation, whereas the alien searched in *Almeida-Sanchez* was not *known* to be an alien at all. 413 U.S. at 271. Thus, administrative searches are limited to subjects known to be within the coverage of the regulation involved. Applying these principles to Illinois Migrant Council v. Pilliod, it is not clear whether a category of "administrative *stops*" is permissible at all, given the distinction between persons and businesses which the Supreme Court identified in *Almeida-Sanchez*. If permissible, such administrative stops should be limited to those persons known to be regulated—*known* aliens—not persons merely suspected of being aliens.

Limited to the factual circumstances upon which it is based, *Illinois Migrant Council* does not prohibit questioning of *known* aliens. There, the I.N.S. agents had no knowledge of the alienage of any of the persons stopped. The issue of the government's ability to maintain communication with known registered aliens is a different one from the issue of whether I.N.S. agents may stop and interrogate anonymous persons on the street merely because such persons are by their appearance or actions suspected by the agents of being aliens.

In *Almeida-Sanchez*, the government's attempt to lower the requisite standard for justifying *searches* merely on the basis of the alienage of the subject was outright rejected; the government's argument in *Illinois Migrant Council* that the standard for

The government's third proposition—which this article will focus on—raised the substantive issue[22] of whether the fourth amendment prohibits an I.N.S. agent from stopping and questioning a pedestrian[23] absent a reasonable suspicion, based on specific articulable facts, that such a person is an alien unlawfully within the United States. The determination of this issue depended upon the disposition of other questions: whether the minimal questioning in *Illinois Migrant Council* constituted sufficient intrusion as to warrant the same protection afforded seizures which might be more drastic or forcible; and further, whether the proper standard was one which required a suspicion not of mere alienage, but of illegal alienage. After dismissing as unrealistic any distinctions between "mere questioning" and "forcible detention", the district court held that the minimal nature of the intrusion lowered the standard of justification only from the level of probable cause to that of reasonable suspicion of illegal alienage. As a basis for its decision, the court looked to the few Supreme Court cases that have touched upon this issue.

THE SUPREME COURT CASES

The first case in which the Supreme Court discussed the fourth amendment standards governing intrusions short of an arrest was *Terry v. Ohio*.[24] There, the Court, while acknowledging a distinction between detentions amounting to an arrest and those short of an arrest, made it clear that even temporary detentions are covered by the fourth amendment: "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[25] Such a seizure must be evaluated on the basis

justifying *stops* should be lowered because of the alienage of subjects is no more persuasive. The I.N.S. agents are not prohibited from routinely communicating with and monitoring known registered aliens. They are only prohibited from stopping and questioning individuals on mere suspicion of alienage.

22. Whether or not a three judge panel is required, and even if a statute were being challenged, "[i]t is clear . . . that no Act of Congress can authorize a violation of the Constitution." Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973).

23. While United States v. Brignoni-Ponce involved a vehicular stop, there is no apparent reason for requiring a higher standard for vehicular stops than for pedestrian stops. The automobile occupies no privileged place in the law which would justify such a distinction. "Indeed to the extent that differing Fourth Amendment standards have developed among persons, places and vehicles, the less stringent have been applied to vehicles because of the exigent circumstances inherent in their operation." Illinois Migrant Council v. Pilliod, 398 F. Supp. 882, 898 (N.D. Ill. 1975) (citations omitted). Actually the cases cited by the court distinguished between vehicles and places and did not expressly concern pedestrians. Nevertheless, they are authority for the proposition that the automobile does not occupy a place requiring an especially high standard.

24. 392 U.S. 1 (1967).

25. *Id.* at 16. The government apparently did not dispute plaintiffs' contention that the encounters complained of constituted stops, or that such stops are seizures subject to fourth amendment principles. The courts have fairly consistently found that detentions occurred where persons were questioned by a law enforcement authority: United States v. Luckett, 484 F.2d 89 (9th Cir. 1973) (policeman waving jaywalker over to police car); United States v. Santana, 485 F.2d 365 (2d Cir. 1973) (policeman

of the governmental interest involved in that seizure and the severity of the intrusion which the seizure entails.[26] Further, "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[27] Thus, once a seizure has been found to have occurred, the seizure must be justified not by "inarticulable hunches"[28] or "good faith",[29] but by "specific and articulable facts",[30] which, given the governmental interest involved, would warrant the particular intrusion entailed by that seizure.[31]

Non-border searches[32] by I.N.S. "roving patrols" were found to be

tapping on car window and asking driver to produce driver's license); United States v. DeMarco, 488 F.2d 828 (2d Cir. 1973) (policeman requesting occupants of van to accompany him to station "to clear up this mess"); United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971) (policeman walking up to parked car, flashing badge, telling driver to roll down window). *But see* United States v. Cross, 437 F.2d 385 (5th Cir. 1971); Government of Virgin Islands v. Kirnon, 377 F. Supp. 601 (D. St. Croix 1974). In the recent alien cases, even those cases otherwise in conflict with Illinois Migrant Council v. Pilliod agree that temporary questioning constitutes a seizure: Shu Fuk Cheung v. Immigration and Naturalization Serv., 476 F.2d 1180, 1181 (8th Cir. 1973); Cheung Tin Wong v. Immigration and Naturalization Serv., 468 F.2d 1123, 1127 (D.C. Cir. 1972); and Au Yi Lau v. Immigration and Naturalization Serv., 445 F.2d 217, 222 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971); United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973).

26. 392 U.S. at 21. *Accord*, Camara v. Municipal Court, 387 U.S. 523, 534-37 (1967).

27. 392 U.S. at 21. Technically, no definitive "seizure" standard was established by the holding in Terry v. Ohio, since a frisk was also involved. "In Terry v. Ohio . . . the Court declined expressly to decide whether facts not amounting to probable cause could justify an 'investigatory seizure' short of an arrest, but it approved a limited search." United States v. Brignoni-Ponce, 95 S. Ct. 2574, 2580 (1975) (citation omitted).

28. 392 U.S. at 22.

29. *Id.* at 22.

30. *Id.* at 21.

31. For a general discussion of the developing law in this area, see Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U. SAN FRAN. L. REV. 219 (1974).

32. The law covering searches and seizures at the *border* or its functional equivalent has been succinctly summarized in Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

> It is undoubtedly within the power of the Federal Government to exclude aliens from the country. It is also without doubt that this power can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders. As the Court stated in Carroll v. United States: 'Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.'
>
> Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself but at its functional equivalents as well. For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a non-

covered by the fourth amendment in *Almeida-Sanchez v. United States*.[33] The Court held that probable cause was required in non-border searches of automobiles in spite of the governmental interest involved. Pointing out that the officers had not even satisfied the "reasonable suspicion" standard[34] enunciated in *Terry*, the Court said:

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in a constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.[35]

Thus, the special problems and needs of the I.N.S. were found to warrant no special standard in *Almeida-Sanchez*.

Not until *United States v. Brignoni-Ponce*[36] did the Court actually apply the *Terry* language to a "stop" by the I.N.S. Automobile stops which were not even founded on a reasonable suspicion that the vehicle contained aliens were there held unconstitutional. The government had argued that the intrusion involved in the stop was so slight,[37] and the governmental interest so substantial, that the stops were warranted. The Court replied that "the importance of the governmental interest at stake, the minimum intrusion of a brief stop, and the absence of practical alternatives for policing the border"[38] only reduced the required justification from probable cause to reasonable suspicion.[39] The effect of *Brignoni-Ponce* is that I.N.S. officers may not stop vehicles absent specific articulable facts sufficient to support a reasonable suspicion that such vehicles contain "aliens who may be illegally in the country."[40] The Court expressly reserved the question of whether agents may stop persons "reasonably believed to be aliens when there is no reason to believe they are illegally in the country."[41] The district court in *Illinois Migrant Council*, relying on these three Supreme Court cases, answered this question in the negative. In so doing, it rejected the two-prong standard developed by the District of Columbia and Eighth Circuits.

stop flight from Mexico City would clearly be the functional equivalent of a border search.

413 U.S. at 272-73 (citations omitted).

33. 413 U.S. 266 (1973).

34. *Id.* at 268.

35. *Id.* at 273.

36. 95 S. Ct. 2574 (1975).

37. "The intrusion is modest. The Government tells us that a stop by a roving patrol 'usually consumes no more than a minute' . . . . According to the Government '[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.' " *Id.* at 2579.

38. *Id.* at 2580.

39. *Id.* at 2580-82.

40. *Id.* at 2582.

41. *Id.* at 2582 n.9.

TWO-PRONG STANDARD: MERE QUESTIONING V. FORCIBLE DETENTION

There seems to be little doubt that even temporary questioning of the sort present in *Illinois Migrant Council* constitutes a seizure.[42] The question is whether the same level of justification is required for such questioning as would be required for other detentions short of arrest.[43]

The District of Columbia Circuit, in *Au Yi Lau v. Immigration and Naturalization Service*,[44] developed a two-prong standard for I.N.S. stops and interrogations. Where "mere questioning, which assumes the individual's cooperation," is involved, that Circuit would require only that the subject was reasonably believed to be of alien origin.[45] But where temporary "forcible detentions" are resorted to, the Court would require the higher standard of "circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is *illegally* in this country".[46] The rationale behind using two separate standards lies in the balancing of the nature of the intrusion and the governmental interest involved. The District of Columbia Circuit views "mere questioning" as less obtrusive than "forcible detention", and thus as requiring a lesser justification.

The District of Columbia Circuit's dividing line between their two categories is not clear. The "forcible detentions" category was created in *Au Yi Lau*, where suspects were stopped while attempting to flee a restaurant in order to avoid the I.N.S. agents.[47] The "mere questioning" category apparently grew out of the case of *Yam Sang Kwai v. Immigration and Naturalization Service*,[48] in which an I.N.S. officer entered the restaurant and questioned the petitioner concerning his right to be in the United States.[49] The difference between the two situations seems to be that in *Au Yi Lau* the subjects attempted to flee, and were restrained, while in *Yam Sang Kwai*, there was no attempt to flee. No doubt, the subject of the questioning in *Yam Sang Kwai* would have been prevented from leaving

42. *See* note 25 *supra*.

43. Government Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 6-11, Illinois Migrant Council v. Pilliod, 398 F. Supp. 882 (N.D. Ill. 1975).

44. 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971).

45. *Id.* at 222.

46. *Id.* at 233 (emphasis added).

47. As the officers proceeded towards the kitchen, they observed a person of Chinese extraction . . . scurrying through the dining room to the main entrance door. One officer . . . followed him to the door, stopped him, identified himself . . . and asked the individual . . . to accompany him to the kitchen. As the two headed back to the kitchen, a second employee . . . was met by them as he appeared to be hurrying towards the front door. He was requested by Officer Burns to go to the kitchen for a talk. Lam did so momentarily, but suddenly darted through a side door only to encounter Officer Lamoreaux who asked if he was off a ship and received an affirmative answer. 445 F.2d at 219.

48. 411 F.2d 683 (D.C. Cir.), *cert. denied*, 396 U.S. 877 (1970).

49. The language barrier was insurmountable, and the subject sent for a friend to interpret. Meanwhile, he went about his business until the friend arrived. *Id.* at 684.

had he tried, just as those in *Au Yi Lau* were. If this is the case, under the District of Columbia standards, it might be expedient for a suspect to attempt to flee, since the higher standard of justification could then be invoked. But presumably an attempt to flee would, in itself, justify a "forcible detention" because of its highly suspicious nature.[50] The District of Columbia Circuit had difficulty applying its own standard in the very set of facts out of which the standard was developed. "In the case of petitioner Yim, indeed, it is not even clear that there was a detention against his will since, once accosted in his apparent progress towards the front door, he appears to have acquiesced readily to the request by Officer Burns to accompany him to the kitchen."[51] It thus appears that even an initial attempt to escape would be insufficient, and that there must be continuous resistance, in order to raise the level of the encounter to a forced detention. The other subjects, according to the court, "manifested their purpose to flee in a more positive manner, and would have gotten away if they had not been affirmatively intercepted."[52] The difference is a very subtle one, if indeed any difference does exist.

The District of Columbia standard was applied by the Eighth Circuit in *Shu Fuk Cheung v. Immigration and Naturalization Service*,[53] where the Court found that the questioning fit the "mere questioning" standard, but that the subject's answers "were, evidently, of such an unsatisfactory nature" that probable cause for arrest existed.[54] Applying this line of reasoning to the *Illinois Migrant Council* facts, the "mere questioning" of Larry Sandoval could have led to probable cause for an arrest had he continued to refuse to "satisfactorily substantiate his right to be in the United States."[55] Since Sandoval made no attempt to flee, presumably the encounter would have been "mere questioning". On the other hand, his lack of cooperation might have converted it to a "forcible detention". In either event, Larry Sandoval, and the Chinese aliens in *Au Yi Lau, Yam Sang Kwai*, and *Shu Fuk Cheung* were clearly detained and the presence of the force behind the detention varied only in that in one case it was exercised, while in the others it was merely present and waiting to be exercised if called for. The district court in *Illinois Migrant Council* recognized this problem when it expressly rejected both the two-prong standard of *Au Yi Lau* and an underlying assumption of that standard, the existence of a meaningful distinction between the two categories of encounters. The court noted that the line be-

50. "It was the response to the appearance of the immigration officers, which . . . sufficed to create a reasonable suspicion." 445 F.2d at 223. *See also* Illinois Migrant Council v. Pilliod, 398 F. Supp. 882 (N.D. Ill. 1975).

51. 445 F.2d at 223-24.

52. *Id.* at 224.

53. 476 F.2d 1180 (8th Cir. 1973).

54. *Id.* at 1182. There the court did not explain what the subject's answers had been.

55. *Id.* at 1181.

tween mere questioning and forcible detention is too faint and too easily crossed.[56] Explaining, the court said:

> Any agent worthy of the calling expects cooperation and knows how to get it. Implicit in the introduction of the agent and the initial questioning is a show of authority to which the average person encountered will feel obliged to stop and respond. Few will feel that they can walk away or refuse to answer. And if they should, Larry Sandoval's experience teaches the consequences. He was grabbed and placed in the agents' car to be taken 'to Chicago.'[57]

Even assuming that there is some kind of distinction which can be made as to whether an encounter constitutes mere questioning as opposed to forcible detention, the difficulty of differentiating would lead to an after-the-fact determination of which standard was appropriate to the facts of the encounter. *Illinois Migrant Council*, on the other hand, sets one standard for such encounters such that the agent knows, at the time of the encounter, what the requisite suspicion must be, namely that of illegal alienage. Under the District of Columbia Circuit rule, the type of suspicion necessary would depend upon a distinction which even that court had difficulty applying.

While there is considerable variation in the types of encounters which may occur between law enforcement officials and other persons, the Supreme Court has never held that each variation requires its own separate standard of justification. Instead, the Court has viewed encounters through categories. The fourth amendment applies to two distinct types of encounters, searches and seizures. The Supreme Court has further divided the category of searches into full-scale searches and frisks, with each of these categories having its own standard. Only two forms of seizure have been specified by the Court, arrests and stops. Just as a frisk is a less intrusive form of search than a full-scale search, a stop is a milder form of seizure than an arrest, and in each case the standards are thereby lessened.

The types of seizures which constitute an arrest vary in form. An officer need not announce an arrest or actually exercise overt physical restraint over a person for that person to be under arrest. Yet one standard of justification is applied for any arrest, no matter what level of intrusion the arrest involves or how the arrest is made. Similarly, the wide range of possible encounters which would constitute a stop should not require separate standards of justification either.

Given the doubtful viability of a "mere questioning"-"forcible detention" distinction, the high degree of difficulty in applying such a distinction, either in the field or in the courtroom, and the failure of the Supreme Court to

56. 398 F. Supp. at 899.

57. *Id.* at 899. The experience of the Chinese aliens in Au Yi Lau v. Immigration and Naturalization Service also teaches the consequences.

require different standards for different types of arrests, the use of one standard for stops of aliens appears warranted. In fact, the decisions appear to require at a minimum a suspicion of illegal activity before any "seizure" can take place.

SINGLE STANDARD: REASONABLE SUSPICION OF ILLEGAL ACTIVITY

The language in *Terry* as well as in the more recent search and seizure cases indicates that the Supreme Court is not ready to permit seizures on any basis short of reasonable suspicion of illegal activity. Thus, it was pointed out in *Terry* that even though probable cause is not required when the intrusion does not reach the level of an arrest or a full-scale search,[58] "the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context."[59] There is certainly no more basic notion underlying probable cause than that there be a basis for belief that an offense has been or is being committed.[60] The Court in *Terry* also noted that the intrusion must be reasonably related to the governmental interest involved. Since the ultimate purpose of the government in stopping aliens is the detection of illegal aliens, it seems to follow that the intrusions should to the extent possible be limited to illegal aliens.

The Supreme Court cases since *Terry* also suggest that a suspicion of illegal activity is necessary. In *Adams v. Williams*[61] the Court discussed the justification for brief stops in terms of a suspicion of criminal activity.[62] While *Brignoni-Ponce* reserved the question of whether the suspicion must be of illegal alienage since the facts did not require such decision, the language used in the text continued to phrase the standard in terms of illegal alienage.[63]

58. 392 U.S. at 20-22.

59. *Id.* at 20.

60. 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt' . . . . Probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense is being committed.

Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

One general interest is of course that of effective crime prevention and detection. It is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.

392 U.S. at 22.

61. 407 U.S. 143 (1972).

62. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Id. at 145.

63. 95 S. Ct. at 2580, 2582.

Thus, the cases appear to assume or imply that the fourth amendment requires at least a suspicion that illegal activity is afoot before a person's freedom of movement may be interrupted by a stop. If one views illegal activity and the detection thereof to be the basis for allowing seizures, it is reasonable to view the fourth amendment as requiring some suspicion of illegality as a prerequisite to any seizure, even one constituting a minimal intrusion. This approach, combined with the view that the fourth amendment should be applied initially through basic categories of seizures, results in the conclusion that no stops may be made of persons absent the requisite reasonable suspicion of illegal alienage. This standard is applicable to all stops, whether brief or more extended in nature, whether there is a direct restraint exercised by the agent or a more subtle assertion of authority. The agent may have broad discretion, however, in determining whether specific facts warrant such a reasonable suspicion. An agent is probably more equipped to make this type of factual determination than to make a determination of whether one technical legal concept applies as opposed to another. It may even be appropriate for a reviewing court to consider the relative intrusiveness of the particular stop in evaluating whether there was an abuse of discretion as applied to the specific circumstances. In this way, a flexibility could be allowed while maintaining the important element of some form of suspicion that a violation of law is occurring or has occurred before persons may be stopped and interrogated. The operation of this approach may be seen more clearly in the examination of the practical effect of *Illinois Migrant Council.*

PRACTICAL EFFECTS

In view of the fact that fourth amendment application does involve a balancing between governmental interest and intrusion upon individual freedom, the governmental interest must not be unduly stifled and the individual freedom must not be unreasonably restricted if the amendment is to be properly applied. Thus an examination of how the *Illinois Migrant Council* standard might operate in practice is necessitated.

Both *Brignoni-Ponce* and *Illinois Migrant Council* gave examples of factors which would be relevant in establishing the requisite reasonable suspicion. Since *Brignoni-Ponce* involved a vehicular stop somewhat near the border, the Court focused its recitation on factors relevant to such stops.[64] In that context, characteristics of the area and its proximity to the border, the usual patterns of traffic on the particular road, and information about recent illegal border crossings all may be taken into consideration. Aspects of the vehicle itself, such as station wagons with compartments commonly used for concealment of aliens, or the fact that a vehicle appears

64. *Id.* at 2578.

to be heavily loaded may also be relied upon in establishing reasonable suspicion. Specifically, "obvious attempts to evade officers can support a reasonable suspicion."[65] In addition, the I.N.S. officer may consider such subjective factors as the person's mode of dress and haircut and may assess the facts "in light of his experience in detecting illegal entry and smuggling."[66]

Although the Court did not indicate what combination of factors would be sufficient to establish reasonable suspicion, it appears that the more subjective and less persuasive factors would be insufficient standing alone. And while it is important to note that the Court's discussion was directed toward vehicular stops made near the border, it is equally important to recognize the clear intention to create a rather broad discretion to be exercised by experienced agents in the field.

In *Illinois Migrant Council*, this broad discretion was also applied to stops made by I.N.S. agents of pedestrians far away from the border. The district court noted:

> [W]hile apparent Mexican ancestry is not enough to support a reasonable suspicion that the person is either an alien or illegally in the country, it is a relevant circumstance which can be taken into account along with dress, hairstyle and speech. Furtive conduct and flight, particularly when the person has become aware of an agent's identity and presence, may justify suspicion as may a person's failure to produce evidence of his identification when it is requested by another.[67]

Thus, it appears that the I.N.S. retains substantial leeway in consideration of subjective factors in justifying stops and interrogations. While the question remains as to what accumulation of factors is required, the language of both decisions indicates a willingness to allow the I.N.S. fairly broad discretion while insisting on basic restraint. This broad discretion, combined with the requirement by the district court of reasonable suspicion of *illegal* alienage, is designed to create a system whereby the I.N.S. is able to perform its important duties while hopefully being prevented from abusing the rights of others in its zeal for dealing with immigration problems.

In addition to the use of such discretion, I.N.S. agents continue to have investigative methods other than stops at their disposal. If an agent suspects an individual of being an illegal alien, but does not have available the specific facts necessary to justify a reasonable suspicion, the subject may be placed

65. *Id.* at 2582.
66. *Id.* at 2582.
67. 398 F. Supp. at 899. The reference to "failure to produce identification" presumably refers to such failure when the subject has received such a request on a basis other than the encounters herein. For example, if an I.N.S. agent witnessed or learned of a person's failure to produce identification upon entering a hospital, such failure would be a relevant factor toward reasonable suspicion.

under limited surveillance so that additional information may be obtained. In the case of Larry Sandoval, the I.N.S. agents required very little basis upon which to satisfy themselves of Sandoval's citizenship. Given the permissible use of subjective as well as objective factors and discretion in evaluating such factors, the agents should be able to obtain information through less obtrusive investigative methods. The same methods for investigation are available to I.N.S. agents as are available to other law enforcement officials. It is possible for such officers, without revealing their identities or otherwise bringing embarrassment to the subject of investigation, to obtain more detailed information, such as the identity of a subject. Once a person's identity has been obtained, it may be possible to determine that the person is a citizen or a legally resident alien,[68] or the information obtained may provide sufficient basis for stopping and questioning the subject.

Another means of dealing with the illegal alien problem is through the use of stops and searches at borders and border equivalents. While it is no doubt impossible to completely stop the influx of illegal aliens at the border, border equivalents, or near the border, it is not clear that the I.N.S. practices complained of in *Illinois Migrant Council* are any more effective in solving the problem. Very few illegal aliens were detected in all of the area control operations, and yet, many citizens and legal aliens were detained and interrogated, many of them in embarrassing and debasing circumstances.[69] As the I.N.S. points out, the number of illegal aliens in the country has been growing rapidly. Yet, the stops utilized in *Illinois Migrant Council* do not appear to provide an exceptionally effective tool which offers a solution to the nation's illegal alien problem.

Perhaps the most effective means of controlling the illegal alien problem is to develop meaningful penalties which are enforced against knowing employers of illegal aliens. A major reason for the entrance of so many illegal aliens appears to be the fact that jobs are available to Mexicans at wages above those prevailing in Mexico. It is the ability of the employer to pay very low wages to the known illegal alien that makes the illegal alien more attractive than the citizen or legal alien competitor for employment. Without the cooperation of employers, it is doubtful that the magnitude of this problem would be what it is today.

In summary, the combination of enforcement methods consisting of border and border equivalent stops and searches, concentration on employers, surveillance and other conventional indirect investigation, and stops and interrogations based on reasonable suspicion of illegal alienage leave the

68. The I.N.S. could check its own files to determine whether the subject is a registered alien, and if so, whether the person continues in good status. See *supra* note 21 for a discussion of this case's effect on monitoring legal aliens and note 20 for examples of such monitoring.

69. 398 F. Supp. at 888-91.

I.N.S. with sufficient resources in its mission to enforce the nation's laws. While the agents would no doubt find their job somewhat facilitated by the ability to stop anyone whom they believe to be an alien, they, like all enforcement officials must fit their enforcement methods to the constraints of the Constitution. The freedom being protected is one about which the Supreme Court has said, "No right is held more sacred or is more carefully guarded, by the Common Law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[70] As such, the standard protecting that freedom should stand unless the I.N.S. capacity for enforcing the immigration laws is clearly and severely inhibited thereby. Given the availability of other enforcement methods, it would appear that no such inhibition need result.

The converse of the problem discussed above is whether the I.N.S. agents will be sufficiently restrained by a standard which permits them such wide discretion. Such factors as hairstyle, and modes of dress and speech have been identified as relevant in the determination of whether a person may reasonably be suspected of being an illegal alien. Some of the clothing worn by *Illinois Migrant Council* plaintiff Arturo Lopez, a citizen of the United States, was made in Mexico[71] and presumably many other citizens as well as legal aliens wear Mexican-made clothing and continue to wear hairstyles associated with Mexico. Many legal aliens and citizens of this country speak Spanish as their first, if not only, language. These characteristics are especially likely to apply to those persons of Mexican ancestry who are proud of their heritage and wish to maintain its cultural traditions while living in the United States. To make such personal habits the basis for detention and interrogation would have the effect of penalizing those of Mexican ancestry who do not conform to the dress and speech patterns of mainstream America. The fact that Arturo Lopez was wearing Mexican made clothing may indicate that the district court does not intend clothing or even speech to be sufficient to justify stops. Certainly, the more incriminating factor of flight upon the realization of an agent's presence is a better basis for reasonable suspicion. Nevertheless, just as the balancing process requires unwelcome restraints from the I.N.S. point of view, it may be that the application of the *Illinois Migrant Council* standard will also involve the use of some factors which normally would not be indicators of illegal activity. The vagueness inherent in the standard is probably required by the nature of the problem and the application to particular sets of circumstances will inevitably rest with the courts. Until such application, there remains the potential for circumvention of the intent of the standard by resourceful I.N.S.

70. Terry v. Ohio, 392 U.S. 1, 9 (1967), *quoting* Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

71. 398 F. Supp. at 888.

agents or the undue frustration of the ability of I.N.S. agents to perform in the field. Hopefully, a successful blending of interests will result, such that the nation's immigration laws will be enforced without unreasonable encroachment upon the fourth amendment rights of citizens and legal aliens.

CONCLUSION

The encounters of *Illinois Migrant Council* have been evaluated through a balancing of the unquestionably legitimate governmental purpose of regulating immigration and the invasion of the subjects' fourth amendment rights. This balancing process is by no means an easy one in such a case, especially with such little guidance from the Supreme Court on the subject of stops.[72] But important as the governmental interest involved is,

> [The fourth amendment rights involved are] not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and the most effective weapons in the arsenal of every arbitrary government.[73]

Any lessening of the standards which constitute the day-to-day embodiment of this indispensable freedom should be cautiously and reluctantly undertaken. To permit a standard of justification which requires not even a suspicion of illegality would be too drastic a step for such purposes as are herein involved. The district court in *Illinois Migrant Council* has enunciated a standard which preserves this requirement but which permits fairly broad leeway for the evaluation of surrounding circumstances, objective and subjective, upon which reasonable suspicion of illegal alienage may be based. This standard creates a framework with which the I.N.S. can work in attempting to fulfill its statutory mission, while simultaneously adhering to its constitutional mandate under the fourth amendment. Perhaps clarification and even adjustment will be required to prevent the frustration of either the statutory mission or the constitutional mandate. But in forging a solution to the difficult problem at hand, *Illinois Migrant Council* should provide a reasonable standard with which to begin.

RONALD A. STEVENS

72. United States v. Brignoni-Ponce was the first case in which the Supreme Court dealt with a factual setting involving a stop short of arrest without an accompanying search of any kind.

73. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting), *quoted with favor*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973).